United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7351

United States Court of Appeals

For the Second Circuit

KARL M. NEIMAND, *et al.*, *Plaintiffs-Appellees,*

and

GEORGE COOPER, *et al.*, *Plaintiffs-Intervenors,*

and

GEORGE SCHWARTZ, *et al.*, *Additional Plaintiffs-Intervenors,*

against

MENDON PROPERTIES, INC., *et al.*, *Defendants-Appellants,*

and

EUGENE RODIN, *et al.*, *Defendants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT VOGEL

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UNITED STATES COURT OF APPEALS
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REPLY BRIEF OF DEFENDANT-APPELLANT VOGEL

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1. General Review of Appellees' Brief.

Analysis of the substance of the Appellees' Brief shows that despite all its "sound and fury" it has not disposed of the major points made in the Vogel Main Brief:

A. VOGEL was threatened with criminal prosecution if he would not agree to a settlement satisfactory to the plaintiffs. This necessarily implied a promise not to prosecute if he agreed to such a settlement.

B. The state of mind created by these threats

remained with VOGEL throughout. It caused him to agree to the "Settlement Agreement."

C. An agreement so induced is illegal, void and unenforceable.

D. At the time VOGEL signed the "Settlement Agreement" and at the time he "performed" it (at the closing), he did not know that he was the subject of a criminal investigation.

E. His subsequent acts were not a "ratification" of the "Settlement Agreement" because they were for his own benefit and were performed at a time when he did not know that he was the subject of a criminal investigation.

F. In any event this illegal contract could not be ratified.

G. Such fact conflicts which exist, if material, cannot be resolved on conflicting affidavits. Under settled law they must be resolved in an evidentiary hearing.

2. Threats of Criminal Prosecution.

The threats of criminal prosecution made to VOGEL in 1974 have been denied only in the most general terms, if at all. However, the Appellees' Brief now admits (p. 18) the meeting between VOGEL and KANTON in the spring of 1975 in the course of which KANTON repeated his threats (83a).

VOGEL's execution of the "Settlement Agreement" under the continuing pressure of these threats of criminal prosecution, and in an effort to avoid such criminal prosecution, makes that "Settlement Agreement" illegal, void and unenforceable. The law on this is discussed on pages 9-12 of VOGEL's Main Brief. Further authority is found in 10 N.Y. Jurisprudence: Contracts, Secs. 163, 164:

> "§ 163. Compounding crimes.
>
> "A statute declares it to be a crime to take money or something else of value upon an agreement to compound a crime. Frequently, an agreement relating to the suppression of criminal prosecutions is one of the terms in a settlement with the victim of the crime. Such settlements, which usually involve compensation by the offender or by someone acting in his interest for the injuries resulting from the crime or restitution of the property wrongfully appropriated, are made with the understanding that the offender is not to be prosecuted. The making of such an arrangement is usually called 'the compounding of an offense.' The objection to such an agreement is that it tends to benefit an individual at the expense of defeating the course of public justice. Thus, with the possible exception of offenses the prosecution of which may not be regarded as essential to the public welfare, compounding of offenses is illegal and promises made in consideration thereof are unenforceable.
>
> "A contract having for its consideration the compounding of a felony cannot be given validity by ratification.
>
> "The objection that a <u>contract upon which suit is brought is void as against public policy, because it seeks to compound a felony</u>, may be taken at any time and without answer. **(emphasis supplied)**

"§ 164. Effect of guilt or innocence of accused.

> "It is the general rule that an agreement to suppress a criminal prosecution is illegal whether the person charged is innocent or guilty. Thus, an instrument given to suppress a criminal prosecution is void as between the parties, without reference to the guilt or innocence of the threatened person."

The appellees' attempt on page 29 of their Brief to distinguish Haynes v. Rudd and Union Exchange Bank v. Joseph on the ground that the threats there were directed against a family member and not against the person who yielded to the threats is specious at best. Williston disposes of it as follows:

> "Finally, there are many cases where it is held that threats of well-founded prosecution of a husband, son, or other relative of the person threatened, may amount to duress. It seems inconsistent for the courts to consider it duress to threaten the prosecution of the third person but not to consider it duress when the very person liable is threatened." 13 Williston: Contracts (3rd ed., 1970) 693. "

The motive for the threats of criminal prosecution is totally irrelevant. In People v. Fichtner, et al. 281 App. Div. 159, 118 N.Y.S. 2d 392 (2d Dept., 1953) affirmed 305 N.Y. 864, 114 N.E. 2d 212 (1953) the defendants, a supermarket manager, and an assistant manager, obtained a $25.00 cash payment from a customer and a signed statement in which the customer admitted that over a period of four months he had stolen $50.00 worth of merchandise from the store. The cash payment was "rung up" on the store register. The customer signed the statement and paid the

money after the defendant had threatened to call a policeman to arrest the customer for petty larceny, with resultant newspaper and radio publicity.

Thereafter the defendants were indicted for extortion, under Section 850 of the New York Penal Law [now Section 155.05 (e)], by inducing fear by a threat to accuse the customer of a crime and to expose him to disgrace. The trial resulted in a conviction. On appeal, the Appellate Division affirmed. It held that:

> "the extortion statutes were intended to prevent the collection of money by the use of fear induced by means of threats to accuse a debtor of crime, and it makes no difference whether the debtor stole any goods, nor how much he stole, and that defendants may properly be convicted even though they believed that the complainant was guilty of the theft of their employer's goods in an amount either equal to or less, or greater than any sum of money obtained from the complainant. Nor is defendants' good faith in thus enforcing payment of the money alleged to be due to their employer a defense."

3. An Agreement Induced By Threats of Criminal Prosecution Cannot Be Ratified.

VOGEL's Main Brief (pages 14-16) shows why, as a matter of fact, he did not ratify the "Settlement Agreement." Apart from this, however, as a matter of law, a contract extorted by threats of criminal prosecution cannot be ratified by subsequent

conduct, since such a contract is illegal and void from its inception. 10 N.Y. Jurisprudence: Contracts, Section 163 (quoted above); Strauss Linotyping Co. v. Schwalbe 159 App. Div. 347, 144 N.Y. Supp. 549 (1st Dept., 1913).

In Strauss the defendant entered into a contract with the plaintiff whereby he agreed not to engage in the linotype business in New York City for five years (except as to a specified customer). The "consideration" for this agreement was the withdrawal by the plaintiff of a charge of grand larceny against the defendant. Thereafter the defendant failed to comply with the restrictive covenant. The plaintiff sued for an injunction. The defendant pleaded illegality of his agreement based on its having been induced by the threat of criminal prosecution. The Appellate Division reversed the trial court's judgment which had granted the injunction sought, and upheld the defendant's position. In its decision it said:

> "If Schwalbe had committed the crime charged, then he was guilty of a felony, and an agreement obtained from him which had for its consideration the compounding of that crime was absolutely void and unenforceable. Barrett v. Weber, 125 N.Y. 18, 25 N.E. 1068. Haynes v. Rudd, 83 N.Y. 251.
>
> "The compounding of a felony constitutes a crime in itself. Penal Law (Consol. Laws 1909, c. 40) § 570. If the defendant were guilty of the crime charged - grand larceny - then any agreement which had for its consideration the concealment of the crime, or the discontinuance of the proceeding instituted for its punishment, could not be enforced.

"It is urged that, if the contract were invalid in its inception, nevertheless it can now be enforced because defendants have ratified it. There is absolutely no evidence tending to show that defendants ever did anything indicating an intention to ratify or carry out the agreement; on the contrary, the only evidence bearing on the subject is that they proceeded immediately to violate it. But an illegal contract of this character cannot be given validity by ratification. The agreement is void in its inception and thereafter continues to be void. Sirkin v. Fourteenth Street Store, 124 App. Div. 384, 108 N.Y. Supp. 830." (159 App. Div. 347, 349)

4. Summary Disposition Is Not Proper.

Appellants believe they have demonstrated that threats of criminal prosecution were made to VOGEL and that these threats created an ongoing state of mind (18 a) which caused him to sign the "Settlement Agreement." (see Item 2, page 2, above). However, even if the Court does not reach this conclusion it should conclude that at the very least material issues of fact exist as to whether such threats were made and whether they led to VOGEL's execution of the "Settlement Agreement." These issues cannot be resolved on the conflicting affidavits presented here (14a-88a) and on the conjecture indulged in by the appellees in pages 22-27 of their Brief.

The function of summary disposition "is not to resolve issues of fact but to determine whether any material factual issues are raised after resolving all questionable inferences in

favor of [VOGEL]. Only if no material factual issues exist may the Court make a summary disposition." [U.S. v. Matheson 532 F. 2d 809, 813 (C.A. 2, 1976), cited in Appellees' Brief, page 21] The argument in the Appellees' Brief (pages 22-27) is based on a resolution of all inferences in favor of the appellees rather than in favor of VOGEL. That argument is untenable on this basis alone. In this connection it should be noted that VOGEL has raised no questions at all with respect to the finding that VOGEL defaulted under the terms of the "Settlement Agreement" and with respect to the amount due as a result of that default. The sole question raised by VOGEL - - - the invalidity of the "Settlement Agreement" - - - is totally different.

The resolution of that question requires either a determination of the material issues of fact in favor of VOGEL on the basis of the existing record, or on the basis of an evidentiary hearing in the District Court. The law on this is clear and has been set out in detail in Point IV of VOGEL's Main Brief (pages 16-20). This will result in the

> "far better procedure [of taking] oral testimony as to disputed matters of fact. This is because of the better opportunity that oral testimony gives the trier of fact to determine credibility. Affidavits deprive him of the opportunity to judge demeanor, and the opportunity to observe 'the chastening process of cross-examination.' 'Without these twin tools, normal in the trial of factual issues, the factual conclusion [is] certain to take on an unaccustomed quality of artificiality.'" Murray v. Kunzig 462 F. 2d 871, 877 (C.A. D.C., 1972) reversed on other grounds 415 U.S. 61, 92 S. Ct. 937. 39 L. Ed. 166 (1974) (cited at pages 19, 20 of VOGEL's Main Brief).

The need for an evidentiary hearing can be demonstrated in another way. In order to reach the result which it did reach, the District Court would have had to make the following factual determinations, solely on the basis of VOGEL's two affidavits and the DANNENBERG and KANTON affidavits:

A. The threats of criminal prosecution alleged by VOGEL were never made.

B. Even if they were made, VOGEL knew that he was the subject of a criminal investigation by the Nassau County District Attorney before July 17, 1975, when VOGEL signed the "Settlement Agreement" and before October 6, 1975, when a closing pursuant to the "Settlement Agreement" took place.

C. Even if the above threats were made, VOGEL knew in December, 1975 or in February, 1976 that he had a defense to the plaintiffs' motion for judgment based on the threats of criminal prosecution which induced him to accept the "Settlement Agreement."

Unless the District Court was prepared to disbelieve everything which VOGEL said in his affidavits on this motion (a disbelief for which there would have been no basis), it could not make the above factual determinations, for the following reasons:

A. VOGEL's description of specific threats of

criminal prosectuion on specific occasions were not specifically denied. KANTON's general denial of having made any threats of criminal prosecution, especially in the light of his admission that the Nassau County District Attorney had begun a criminal investigation "in the Spring of 1975," should have been held to be ineffective. At most KANTON's denial should have been regarded only as raising an issue of fact as to whether KANTON had actually made those threats. Obviously, this issue could not be determined on the basis of the conflicting affidavits. Therefore, at the very least, the District Court should have held the evidentiary hearing requested in the VOGEL affidavits in order to enable it to determine the facts.

B. Nowhere in the Record on this appeal is there any basis for a factual determination by the District Court that, either before July 17, 1975, or before October 6, 1975, or before December, 1975, or before February, 1976, VOGEL knew that he was the subject of a criminal investigation by the Nassau County District Attorney and therefore knew that the "threats" had already been carried out. Without such a factual determination the District Court could not really decide that VOGEL had "performed" or "ratified" the "Settlement Agreement" with such knowledge, even assuming that "ratification" were legally possible.

Finally, the Record is clear that this alternative of an evidentiary hearing has been sought at least since May 3, 1976

(19a). Also the failure of the Appellees' Brief to even mention, let alone discuss, Point IV in VOGEL's Main Brief, on the need for an evidentiary hearing, amounts to a concession that that Point IV is valid.

5. The Knowledge of Rogers & Wells Cannot be Imputed To Vogel.

The Appellees' Brief properly describes Rogers & Wells as "a highly respected, national law firm with sophisticated counsel" (page 16) and as "eminently qualified counsel" (page 23). However, nowhere and by no one are they described as "infallible," a description which cannot be given to any lawyer or law firm.

To what "knowledge of Rogers & Wells" do the Appellees refer on page 31 of their Brief as being imputable to VOGEL? There is no showing whatsoever that Rogers & Wells ever knew of, or ever even considered as a possibility, the existence of the "duress" and "extortion" defense later asserted by VOGEL. What "knowledge," then, can be imputed to VOGEL?

Moreover, even if Rogers & Wells knew of such a defense but did not communicate such knowledge to VOGEL, there could be no imputation to VOGEL of such knowledge. VOGEL asserts that he did not raise this defense earlier because he did not know of it until that time his intention would have to be to perform the "Settlement Agreement" when and if he could. Where the actual intention exists and its existence is relevant, there can be no

constructive knowledge, and "actual intention can only be judged by actual knowledge." Flinn Realty Corp. v. Charter Construction Co. 181 App. Div. 610, 612, 169 N.Y.Supp. 116, 118 (1st Dept., 1918).

6. This Appeal Is Not Frivolous. In Effect This Court Has So Held.

This appeal is not frivolous. The best demonstration of this is contained in VOGEL's Briefs. Both of them raise substantive and substantial questions and argue them in a manner which entitled them to careful consideration, irrespective of this Court's ultimate decision.

Similarly, those arguments were worthy of the District Court's consideration and should not have been regarded by that Court as "frivolous."

Furthermore, this Court has in effect already determined that this appeal is not frivolous. On September 10, 1976 the Appellees noticed a motion in this Court for an order of summary affirmance of the decision below and for an order dismissing this appeal as "frivolous." A three-judge bench of this Court heard both sides in oral argument on this motion after having the motion papers before it, and then denied the motion "to summarily affirm the judgment [below] and dismiss the appeal * * *." (copy attached) Surely there were sufficient facts and argument before the Court in the motion papers, the oral argument and the answers to its

questions to have demonstrated any frivolity in the appeal. By denying the motion to dismiss the appeal as frivolous the Court clearly showed and held that it believed that the appeal was not frivolous. This should dispose of the renewed claim of frivolity.

The cases cited in the Appellees' Brief on frivolity are not in point because their facts are so different from the situation in this case which, as shown above, merits judicial consideration. In Acevedo a completely sham appeal for review was made simply to delay the date of deportation. In Fluoro Electric and in Clarion the Courts found a clear showing of bad faith. No such "bad faith" can be found in our case nor has its existence even been suggested. In Gruss the Court found that the issues on appeal were superfluous; that many of them were frivolous; and that they were briefed without regard to the evidence supporting the determination appealed from. None of these exist in our case. We have only one issue on this appeal; the appeal has already in effect been found not to be frivolous; and the briefing has considered, analyzed and discussed all the relevant facts urged by the Appellees.

7. Specific Comments on Appellees' Brief.

The following brief comments are offered with respect to specific statements in the Appellees' Brief, in the order in which they occur:

Pages 4; 5 - - - The word "deliberately" as used here carries a pejorative connotation. In the affidavit referred

to [on a motion by the appellees for dismissal of this appeal as frivolous which this Court denied (see Item 6, above)] the statement was made by VOGEL's attorney that opposition to the motion for the second set of judgments would be an "exercise in futility" because such opposition would be on the very same grounds as those which Judge Neaher had rejected on the motion for the judgments here involved and would therefore be rejected by him again. He also stated his belief that if this appeal were successful the second set of judgments could then be set aside on motion.

Page 8; 18 - - - VOGEL had no knowledge as to the subjects of the "then pending criminal investigation" by the Nassau County District Attorney.

Page 14 - - - It is highly significant that EUGENE RODIN wrote this letter alone. This shows that only he had had any contact with the plaintiffs and that only he (and not VOGEL) knew them.

Page 17, footnote - - - No affidavit was sought from Rogers & Wells because of the effect that such an affidavit might have on the attorney-client privilege in general and because of the possible conflict of interest betweeen Rogers & Wells and VOGEL on demonstrating by their affidavit that VOGEL had been threatened and that VOGEL had a valid defense as a result of the threats.

Page 18 - - - Reasonable men can differ as to whether the three short inside press clippings (67a-69a) showed "broad" press coverage.

Page 19, bottom - - - VOGEL has never had any knowledge that "complaints were in fact made in early 1975" (18a).

Page 21 - - - This settlement did not require approval by the District Court and it never received such approval. The District Court was merely informed that a settlement had been reached (65a; also pages 5 and 6 of the Appellees' Brief). Newman was a stockholders' derivative action so any settlement required Court approval.

Page 21 - - - As stated in Beal, we have adduced "factual material which * * * presents countervailing facts."

Page 21, footnote - - - This does not distinguish Autera at all. VOGEL could say with equal cogency that he did not speak "law" well.

Page 22 - - - Gill involved a directed verdict after the completion of the plaintiff's case, so that there had been oral testimony, cross-examination and an opportunity to observe the demeanor of witnesses, all of which meet the criteria set forth in Murray v. Kunzig, quoted in Item 4, above. This is altogether different from a determination based only on statements in conflicting affidavits.

Page 22 - - - EUGENE RODIN would have opposed the entry of judgment on the same grounds if he had known that they created a defense (84a). In any event VOGEL is no way bound by the RODINS' failure to appeal. Each party here stands on his own.

Page 23 - - - Urban is not in point because it is a case of "economic duress," where different criteria apply and where no threats of criminal prosecution were made.

Page 24, bottom - - - VOGEL was not "hoping to make a deal." He still has not made a deal but is eagerly awaiting a trial based on his plea of "not guilty."

Page 25, middle - - - Since VOGEL had never met or dealt with the plaintiffs and had no knowledge as to the details of EUGENE RODIN's dealings with them, how could he fear involvement based on an investigation of what EUGENE RODIN had said and done?

Page 25, 26 - - - VOGEL's state of mind and intention was still controlled by the threats made that a complaint would be made against him, since he did not know at this time whether such a complaint had been made.

Page 26, bottom - - - VOGEL and his attorneys do not conduct themselves in this manner.

Page 27, top - - - VOGEL's argument is not now made for the first time. It was made at his earliest opportunity, when he opposed the motion for judgment, on May 3, 1976. When sooner could he have done it?

Page 27 - - - Avey is readily distinguishable:

1. It involved only the question of whether a complaint stated a cause of action.

2. The money sued for was paid after the plaintiff had been indicted.

3. Examination of the briefs shows that in the Appellate Division and in the Court of Appeals, the defendant Town argued that as a public body it could not commit duress and that no duress by the Town had been pleaded. This point can well explain the result of the case.

4. The parties were in pari delicto so that under Union Exchange Bank v. Joseph, as quoted on pages 9 and 10 of VOGEL's Main Brief, "neither is permitted to recover from the other."

5. The quoted language (page 28) was totally unnecessary to explain or support the Court's decision.

Page 27 - - - Allstate is also not in point. It was another case of "economic duress," where no threats of criminal prosecution were made.

Page 29, bottom - - - No such finding is necessary on this appeal.

Page 31, top - - - VOGEL repudiated the "Settlement Agreement" on May 3, 1976 when he opposed the motion for judgment.

This was his first opportunity to do so after he learned of the availability of this defense. Also, more in point is the quotation on page 3, above from a different volume of the same encyclopedia, 10 N.Y. Jurisprudence: Contracts, Sections 163 and 164.

Page 31, bottom - - - It is untrue that VOGEL did not say in his affidavits below that his "performance" was without knowledge of the valid defense now asserted. At 15a he said: "I am informed by my attorney that on the basis of my description of the circumstances under which this 'Settlement Agreement' was 'negotiated' * * * the Plaintiffs are not entitled to the judgments they seek on these motions." At 19a he said: "I am now informed that it is the law of the State of New York that where an 'agreement' is exacted from a party under the pressure and threat of a criminal prosecution, the law will not enforce such an 'agreement.'" Clearly VOGEL did not know of this defense before April, 1976 so his claimed "performance" must have been without knowledge of it.

Page 32 - - - Finley is not at all in point. It deals with a wholly discretionary matter - - - whether an IAS Judge should in fairness fix a trial date rather than dismiss the case. There was nothing "discretionary" in Judge Neaher's decision denying the validity of VOGEL's claim that the "Settlement Agreement" is void and unenforceable because it was procured by means of threats of criminal prosecution.

Page 33 - VOGEL acted in as timely a manner as possible and chose the most expeditious method of securing a definitive determination of the matter. (See also page 21 of VOGEL's Main Brief.)

8. The points made in the Conclusion of VOGEL's Main Brief (pages 21 and 22) have not been shaken by the Appellees' Brief. This Court should therefore rule that the "Settlement Agreement" is unenforceable against VOGEL. At the very least it should order an evidentiary hearing to determine properly the operative facts.

Respectfully submitted,

LEON MALMAN
Attorney for Defendants-Appellants VOGEL, et al.

No.2 . 9-28-76,
76-7351
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UNITED STATES COURT OF APPEALS

Second Circuit

76-7351

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and seventy-six.

Karl M. Neimand, Sydney Jarkow, Arthur A. Ingram, Sydney Mishcon, Morris Cudin, Edward A. Pallack,
and
Plaintiffs

George Cooper, Leonard Milton, Dorothy Levess, Bernard S. Kanton, et. al.,
Plaintiffs-Intervenors-Appellees,

v.

Mendon Properties, Inc., Parkham Development Corp., Seymour Vogel, Kenneth D. Boklan, Eugene Rodin, Bruce Rodin, Sy Vogel Associates, et. al.,
Defendants

Seymour Vogel, Sy Vogel Associates, Mendon Properties, Inc., Byerly Properties, Inc., Tamerlane Properties, Inc. et. al
Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

~~appellant~~ appellee ~~petitioner~~ ~~respondent~~

~~appellant~~ appellee s ~~petitioner~~ ~~respondent~~

f Seymour Vogel, et. al.

by notice of motion dated September 10, 1976 to summarily affirm the judgment and dismiss the appeal from the United States District Court for the Eastern District of New York

be and it hereby is granted ~~denied~~ ; all counsel shall adhere to the briefing schedule previously set.

It is further ordered that

A. DANIEL FUSARO
Clerk

by

Edward J. Guardaro
Senior Deputy Clerk

* * *

BEFORE: ~~HON. STERRY R. WATERMAN~~

~~HON. ELLSWORTH A. VANGRAAFEILAND~~
Circuit Judges

~~HON. CONSTANCE BAKER MOTLEY~~
District Judge Circuit Judges

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NASSAU)

Leila Slavin , being duly sworn, deposes and says:

I am over the age of eighteen years and am not a party to this action. On the date indicated below, I served the annexed document on the attorneys set forth below by depositing a copy thereof, enclosed in a postpaid wrapper, addressed to said attorneys at their office as indicated below, the same being the address previously designated by them for that purpose. The copy was mailed by ordinary mail at an official depository of the United States Post Office, which depository is under the exclusive care and custody of the United States Postal Service.

Date: November 24, 1976

Addressed to: Lipper, Lowey & Dannenberg, Esqs.
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Document: Two copies of Reply Brief

Leila Slavin
LEILA SLAVIN

Sworn to before me this
24th day of November, 19 76

Leon Malman
LEON MALMAN
Notary Public, State of New York
No. 30-2491400
Qualified in Nassau County
Commission Expires March 30, 1977

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